IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. [redacted].

STATE OF NEW JERSEY AND BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY,

Appellants,

vs.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM.

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Foreword.

This brief, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, is filed in opposition to the motion of the New York, Susquehanna and Western Railroad Company (hereinafter sometimes called "Appellee") which seeks to affirm the final judgment of

the statutorily constituted United States District Court of three judges entered on the docket January 11, 1962, and reported in 200 Federal Supplement at page 860.

Appellants' Statement as to Jurisdiction filed herein sets forth the basis of this Court's jurisdiction to entertain this appeal, the statement of the case and a statement of the questions presented by this appeal.

Appellee contends that the questions presented by this appeal are so unsubstantial as not to warrant further argument and therefore the judgment of the District Court should be affirmed.

Statement of the Case.

In accord with Rule 40(3), (4), of Revised Rules of this Court, the Appellants submit the following facts to correct an inaccuracy in the statement portion of Appellee's motion to affirm. On page 3 of its statement, Appellee, in referring to the Public Service Coordinated Transport bus service from Susquehanna Transfer, North Bergen, New Jersey, to the Port Authority Terminal in New York City, and vice versa, states that the buses are "special contract buses operated *exclusively* for Susquehanna's passengers." (Emphasis added.) This is not so because the bus service is also available to the Erie-Lackawanna Railroad train passengers using the eastbound morning train No. 1202 from Nyack, New York, to Hoboken, New Jersey, or the westbound evening train No. 1203 from Hoboken, New Jersey, to Nyack, New York. Both of these Erie-Lackawanna trains stop at Susquehanna Transfer in North Bergen, New Jersey, to enable passengers from train No.

1202 to board the same bus used by the Appellee's passengers bound for the Port of New York Authority Bus Terminal. On the reverse movement passengers for Erie-Lackawanna train No. 1203 may board the same bus used by Susquehanna passengers at the Port of New York Authority Bus Terminal and connect with Erie-Lackawanna train No. 1203 at Susquehanna Transfer.

Because the Appellants had no knowledge that the United States and the Interstate Commerce Commission (hereinafter sometimes called "I. C. C.") would appeal herein, they made no note of the point. It was presumptuous of Appellee to assume that the United States and the I. C. C., whose decision is the subject of this appeal and who both opposed Appellee in the court below as defendants, are now Appellees on the side of Appellee. On the contrary, it is evident that the I. C. C. has not adopted the opinion of the court below in view of its decision in Pennsylvania-Reading Seashore Lines discontinuance case (*Pennsylvania Railroad Company and Pennsylvania-Reading Seashore Lines, Discontinuance of Passenger Train Service*, Finance Docket Nos. 21606 and 21607, I. C. C., April 4, 1962, not yet reported). The decision of the court which is the subject of this appeal was not cited as authority by the Interstate Commerce Commission even though there was a motion to dismiss the proceedings on jurisdictional grounds. There the rail operations consisted of intrastate and interstate transportation. A petition for discontinuance of all train service was brought before the Board of Public Utility Commissioners of the State of New Jersey (hereinafter referred to as "Board") and was denied but some relief was granted by the Board in permitting a reduced schedule. Thereafter, the carriers petitioned before the I. C. C. for a discontinu-

ance under both 49 U. S. C. 13a(1) and (2). The I. C. C., in effect, upheld the Board and did not permit a further reduction of service. The case did involve intrastate trains with integral interstate river crossings. For instance, an intrastate train from Cape May, New Jersey, to Camden, New Jersey, connects at Haddonfield, New Jersey, with an Atlantic City-Philadelphia train for an interstate connection. In like manner, an interstate train from Philadelphia, Pennsylvania, to Atlantic City, New Jersey, connects at Haddonfield with an intrastate train from Camden, New Jersey, to Cape May, New Jersey. The Appellee's conception of the facts in its argument at page 11 is that no intrastate train connects with an interstate service which continues across a body of water into another state. This statement by the Appellee is therefore inaccurate.

The District Court proceeded properly in ordering the continuance of the Appellee's train service, pending appeal to this Court, without requiring a bond from the defendants in the court below. The precedents for this action were two preliminary injunction orders entered by the United States District Court for the District of New Jersey in *Board of Public Utility Commissioners et al.* vs. *New York Central et als.*, Docket No. CI 559-57, and *Board of Public Utility Commissioners* vs. *Interstate Commerce Commission et al.*, Docket No. 802-57 (Preliminary Injunctive Orders not reported). The issue of an injunctive bond was briefed, argued and the court in both instances construed Rule 65(c) of the Federal Rules of Civil Procedure as exempting the moving parties (Appellants herein). The arguments against the bond were (1) that the Appellants were prohibited from giving bond by Article 8, section 2, paragraph 1, of the New Jersey Constitution, and (2) that

the giving of security was not mandatory upon the court and, therefore, in its discretion, the court could grant an injunction without a bond where the public interest was involved.

Appellee's "time for docketing its cross-appeal has been extended pending disposition of this motion, since its prosecution will be unnecessary unless probable jurisdiction is noted." (Pages 5, 6 of Appellee's motion to affirm.) However, should this Court enter an order of reversal, pursuant to its Rule 16(4), before Appellee dockets its cross-appeal and before oral argument, it will also be unnecessary then for Appellee to perfect its cross-appeal.

At page 4 of the statement reference is made to a footnote which purports to show the number of passengers carried. This is based upon a self-serving affidavit of an employee of the Appellee and the information has not been subjected to cross examination to test its validity. Similarly, at pages 2 and 3 in the footnotes there is reference to monetary losses. This also is based upon self-serving affidavits which have not been subjected to cross examination.

ARGUMENT.

POINT I.

The issues before this Court do not concern "terminals" or "buses" but only a "train" or "ferry" because the statute involved is 49 U. S. C. 13a(1) and not section 202(c) of the Interstate Commerce Act (49 U. S. C. 302(c)).

Neither the I. C. C. order of January 18, 1961, nor its order of May 10, 1961, speaks of section 202(c) of the In-

terstate Commerce Act or of terminal areas, even though the I. C. C. was most familiar with its prior decisions (cited by Appellee in its motion to affirm) relating to terminal facilities. Because the Appellee filed passenger train discontinuance notices under section 13a(1) of the Interstate Commerce Act, the I. C. C. properly addressed itself to that law. When the I. C. C., in its first order, found that it was without jurisdiction, the basis of such action was that "each of the trains proposed to be discontinued operate solely within the State of New Jersey and that therefore the said notice filed December 30, 1960, by the New York, Susquehanna and Western Railroad does not constitute a notice properly filed under the provisions of section 13a(1) of the Interstate Commerce Act." The I. C. C. was well aware of the fact that even though terminals were discussed when section 13a was being debated in Congress, the law as enacted limited the I. C. C. jurisdiction to a "train" or "ferry" and did not include terminals or integral parts of terminals. No public body was more concerned or more familiar with the subject matter than the I. C. C., whose administrative interpretation of the statute is entitled to great weight.

In its argument the Appellee continues to misinterpret section 13a and attempts to broaden it to include discontinuance of terminals. This appears to be the cause of the error in the court below, where the court looked at the passengers and the tickets rather than the vehicle. Now the Appellee seeks to have this Court look at the terminal rather than the vehicle. The fact is that the statute is limited by its terms to "discontinuance or change, in whole or in part, of the operation or service of any train or ferry." This Court has held that a train is no more or less than an engine and cars assembled together.

United States v. *Erie R. Co.*, 237 U. S. 402 (1915). Furthermore, the I. C. C., in *Arlington & F. A. R. Co.*, 228 I. C. C. 479 (1938), stated that auto-rail cars, operating within one state as rail cars but converting to auto cars and then crossing the state line into another state, were not an extension of a line of railroad but merely an extension of transportation service. Supporting this proposition that an extension of a line of railroad denotes strictly an extension of the tracks or of the physical facilities that are themselves essential to the operation of a railroad, the I. C. C. cited two decisions of this Court: *Texas & P. Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266 (1926) and *Railroad Commission of California* v. *Southern Pac. Co.*, 264 U. S. 331 (1924). The case of *New York Dock Ry.* v. *Pennsylvania R. Co.*, 62 F. 2d 1010 (3 Cir. 1933), was cited to the same effect. It is respectfully urged that the question whether the bus operation is an intraterminal transfer service incidental to the rail service within section 49 U. S. C. 302(c) and thus exempt from the Motor Carrier Act really has no relevance to the issue here; i. e., whether the provisions of section 13a(1) have been properly invoked by the Appellee to effect a discontinuance of its passenger trains.

The *Ferry* cases* do not support the decision below because the facts were different. Ferries were involved, not buses. No other mode of transportation was involved. The proposed "abandonment" was brought before the I. C. C. under section 1(18) of the Interstate Commerce Act and the issue was whether the proposed action was really an abandonment of a line of railroad. The I. C. C. answered in the affirmative but the Federal District Court reversed and

* 158 F. Supp. 98 and 104 (D. C. N. J. 1957).

the appeal was before this Court when the Transportation Act of 1958 was passed. By this law, the *Ferry* case issue was rendered moot for the Act expressly states that a "train" or "ferry" may be discontinued. Hence, there was no need for this Court to decide if the *Ferry* cases involved an abandonment of a line of railroad.

POINT II.

A jurisdictional dispute between the Federal Government and a State concerning commerce between two States is a constitutional issue of national importance which is meritorious and warrants full consideration by this Court.

If the Appellee's motion to affirm be granted, the reserved powers of the respective states over purely intrastate train service will be greatly diminished. Congress has never used passenger patterns such as transfers, tickets or terminals as a criterion to decide whether a train is styled as intrastate or interstate. Here, it is irrelevant to State jurisdiction that the intrastate train passenger leaves the train at Susquehanna Transfer in North Bergen, New Jersey, to board an interstate bus proceeding across the New Jersey-New York state line. Also, the fact that an interstate ticket is purchased or that a "terminal" may be involved does not change a traditional intrastate train into an interstate train. Congress expressly mentions a "train" and "ferry" in section 13a, nothing more. Although terminals were covered in the Congressional discussions prior to enacting section 13a, it can reasonably be presumed that the omission of the term from section 13a was intentional. Nowhere was the discussion extended to include even a mention of intraterminal transfers; similarly, the absence

of consideration of the effect of passenger behavior on state jurisdiction indicates that no such concepts may be implied within section 13a. It must be stressed that a train, running from a point within a state to another point within the same state, even though connecting with another or the same mode of interstate transportation, still remains an intrastate train within the state's jurisdiction. This is the existing law that would be changed by upholding the Appellee's position which is based upon an improper interpretation of a statute that is clear and not ambiguous.

Appellants' showing of the consequences (divestment of state authority over intrastate trains) that would result from upholding the Appellee's position is characterized by the Appellee as "unsupportable examples." The contrary is true. Appellants' claims are fully supportable. Thus: In *Pennsylvania-Reading Seashore Lines Train Discontinuance*, *supra*, prior to proceeding before the I. C. C., the Pennsylvania-Reading Seashore Lines and the Pennsylvania Railroad Company asked for relief from the Board. Both intrastate and interstate trains were proposed to be discontinued. The Board rendered its decision reducing the operating schedule relating to intrastate and interstate trains, and the I. C. C., far from denying the Board's jurisdiction in the matter, in effect, upheld the ruling of the Board. (I. C. C. Finance Docket Nos. 21606, 21607, not yet reported.) The Appellee is in error when, speaking of the intrastate trains here, it states that no interstate river crossing service integrates with the intrastate trains. As stated above, two intrastate trains connect with interstate trains which travel to Philadelphia. The affirmance of the decision below would pre-empt state jurisdiction over intrastate trains and place that jurisdiction in the federal gov-

ernment. The commerce clause of the United States Constitution, Article I, Section 8, Clause 3, was never intended to deprive the states of control of commerce within their respective territorial jurisdiction. It reads: "Commerce • • • among the several States," not within the several states. Supporting this view is the Tenth Amendment to the United States Constitution reserving to the states their sovereign rights.

Trains that stop at various points within a state but continue across a state line are not by virtue of such stops transformed into intrastate trains. But if a train starts and stops within a state, never crossing a state line, it can never become an interstate train by the mere fact that (1) it connects with an interstate train; (2) the passengers board interstate buses, ferries, taxis or other modes of interstate transportation; (3) the passengers purchase only interstate tickets; or (4) the train completes its intrastate trip in a terminal area adjoining a river separating two states. Each phase of the travel is separate and apart from the other. These principles apply to the Pennsylvania Railroad Company train service at Newark, New Jersey. Admittedly, many Pennsylvania trains discharge passengers at Newark but continue on to New York. It is not urged that the discharging of passengers makes the train an intrastate operation. The movement of the train, not the passengers, determines whether a train is intrastate or interstate. This is what is so clear in section 13a; it refers unambiguously to a train or ferry "operating from a point in one State to a point in any other State" or operating "wholly within the boundaries of a single State."

Neither the Erie-Lackawanna nor the Central Railroad of New Jersey intrastate train operations are converted

into interstate trains, as Appellee contends, because they either connect with interstate ferries or trains. The *Ferry* cases are not authority for Appellee's contention. The issue there was whether a discontinuance of passenger ferries with a continuance of freight ferries was an abandonment of a line of railroad within I. C. C. jurisdiction under section 49 U. S. C. § 1(18). With the passage of section 13a, either a train or ferry crossing a state line could be discontinued by a carrier. Thus, as this Court recognized,* the *Ferry* case issues were made moot by the new law. But this law did not say that an intrastate train connecting with an interstate train or ferry was thereby transformed into an interstate train. Section 13a simply deals with either a "train or ferry," each separate from the other. Appellee's contention that the Erie-Lackawanna and the Central Railroad train operations connecting with interstate transportation are, by virtue of section 13a, interstate trains is therefore plainly erroneous.

In summary, contrary to Appellee's argument, the intrastate operations which may subsequently be affected by an affirmance of the decision below are not unsubstantial but in fact are most substantial, for at least 167 intrastate trains are involved in the State of New Jersey alone.

Conclusion.

The Jurisdictional Statement filed herein by Appellants states the issues and outlines the arguments. Little more can be added at this stage of the proceeding. But the serious problems which flow from an improper interpretation of section 13a are clear. Until they are resolved, neither the Appellants nor the railroads will understand

* 359 U. S. 957 (1959); 359 U. S. 982 (1959).

their respective roles under that law. Appellants respectfully urge that this Court keep its eye on the train or ferry to be discontinued and not on the passenger, ticket, or terminal. If the train begins at a point in a state and that train terminates its run in that same state, the conclusion that it is an intrastate train is inescapable.

Appellants submit that the issues presented on this appeal are substantial; that they are of general public interest and merit fuller consideration by this Court than is possible at this preliminary stage. If, on the other hand, the Court will permit the Appellee to obfuscate the movement of its train by diverting the Court's attention to the movement of the passenger, or the destination on the ticket, or the area of the terminal, then an unintended interpretation may be read into the law. Appellee's motion to affirm should be denied; or, in the alternative, ruling thereon should be deferred until such time as the case is fully heard by this Honorable Court.

Respectfully submitted,

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Dated: June 8, 1962.

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Appellee.

PROOF OF SERVICE

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Appellee.

PROOF OF SERVICE

I, William Gural, one of the attorneys for the State of New Jersey and its Public Utility Commission, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the day of June, 1962, I caused to be mailed 40 copies of the attached Brief in opposition to Appellee's Motion to Affirm to the Clerk of the Supreme Court of the United States, Washington, D. C., for filing in the Supreme Court of the United States, and caused to be mailed copies thereof to the several parties thereto, as follows:

1. On the United States, by mailing a copy thereof, with first-class postage prepaid, to the office of David M. Satz, Jr., Esq., United States Attorney for the District of New Jersey, at Room 451a, Federal Building, Newark 1, New Jersey, and by mailing a copy in a duly addressed envelope, with first-class postage prepaid, to the Solicitor General, at the office of

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I, William Gural, one of the attorneys for the State of New Jersey and its Public Utility Commission, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the day of June, 1962, I caused to be mailed 40 copies of the attached Brief in opposition to Appellee's Motion to Affirm to the Clerk of the Supreme Court of the United States, Washington, D. C., for filing in the Supreme Court of the United States, and caused to be mailed copies thereof to the several parties thereto, as follows:

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2. On the Interstate Commerce Commission, by mailing copies, in duly addressed envelopes, with first-class postage prepaid, to Robert W. Ginnane, Esq., its General Counsel, and to H. Neil Garson, Esq., its attorney of record, at the offices of the Commission, Washington 25, D. C.

3. On the New York, Susquehanna and Western Railroad Company, plaintiffs below, by mailing a copy thereof in a duly addressed envelope, with first-class postage prepaid, to Vincent J. Biunno, Esq., c/o Lum, Biunno & Tompkins, attorney of record, at his office at 605 Broad Street, Newark 2, New Jersey.

4. On the United States District Court for the District of New Jersey, by mailing a copy thereof with first-class postage prepaid, to Angelo Locascio, Esq., its Clerk, at his office at Federal Square, Newark 1, New Jersey.

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